not Reportable
127-490
(5)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 262.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

DANIEL McCUSKER, TILLATHA McCUSKER, HIS WIFE;
THOMAS WALKER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 1, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 262.

THE SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL McCUSKER, TILLATHA McCUSKER, HIS WIFE; THOMAS WALKER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court of the 20th judicial district, &c.	1	1
Complaint	1	2
Demurrer	6	3
Order sustaining demurrer	7	3
Amended complaint	7	4
Demurrer to amended complaint	11	5
Order overruling demurrer	12	6
Answer to amended complaint	13	6
Findings	15	7
Judgment	18	8
Notice of intention to move for a new trial	20	9
Statement of the case on motion for new trial	21	10
Specifications	24	11
Exhibit A—Articles of association, &c., between the Southern Pacific R. R. Co. and the Los Angles and San Pedro R. R. Co., Dec. 17, 1874	26	11
Exhibit B—Abstract of patent from U. S. to Southern Pacific R. R. Co.	37	17
Order denying motion for new trial	42	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 17, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 262.

THE SOUTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

DANIEL McCUSKER, TILLATHA McCUSKER, HIS WIFE; THOMAS WALKER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the district court of the 20th judicial district, &c.	1	1
Complaint	1	2
Demurrer	6	3
Order sustaining demurrer	7	3
Amended complaint	7	4
Demurrer to amended complaint	11	5
Order overruling demurrer	12	6
Answer to amended complaint	13	6
Findings	15	7
Judgment	18	8
Notice of intention to move for a new trial	20	9
Statement of the case on motion for new trial	21	10
Specifications	24	11
Exhibit A—Articles of association, &c., between the Southern Pacific R. R. Co. and the Los Angles and San Pedro R. R. Co., Dec. 17, 1874	26	11
Exhibit B—Abstract of patent from U. S. to Southern Pacific R. R. Co.	37	17
Order denying motion for new trial	42	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 17, 1887.

	Original.	Print.
Order substituting defendant	42	19
Notice of appeal	43	19
Clerk's certificate	45	20
Submission	47	20
Judgment	48	21
Opinion	49	22
Bond	50	22
Assignment of errors	54	23
Citation	56	24
Proof of service of citation	57	24
Writ of error	58	24
Clerk's certificate	60	25

a *Transcript on Appeal.*

In the Supreme Court of the State of California.

THE SOUTHERN PACIFIC RAILROAD CO. OF CAL., Plaintiff and Respondent,
vs.
DANIEL MCCUSKER *et als.*, Defendants and Appellants. } No. 8333.

A. S. Kittredge, attorney for Thos. Walker, appellant.

1 *Complaint.*

In the Supreme Court of the State of California.

In the District Court of the 20th Judicial District of the State of California in and for the County of Monterey.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, Plaintiff,
vs.
DANIEL MCCUSKER, TILLATHA C. MCCUSKER (His Wife), FRANKLIN McCusker, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as Register of the State Land Office of the State of California, Defendants.

2 The said plaintiff, by Hammond & Wright, its attorneys, complains of the said defendants, and for cause of action states—

I.

That said plaintiff and the defendant, The Bank of Watsonville, are, and were at all times hereinafter mentioned, respectively, corporations duly incorporated and existing under and by virtue of the laws of the State of California.

II.

That on the 9th day of October, 1875, this plaintiff was, has ever since been, and now is seized in fee and entitled to the possession of that certain tract of land situated in the county of Monterey, State of California, known and described as follows: "South of base line and east of Mount Diablo meridian, township 12, range 2, lot numbered IV (four) of southwest quarter, and southeast quarter of southwest quarter of section thirty-one, containing ninety-two acres and fifty hundredths of an acre."

III.

That notwithstanding that, and while this plaintiff was and is so as aforesaid, seized in fee and entitled to the possession of
3 the said land, the said defendant, Daniel McCusker, on the said 9th day of October, 1875, unlawfully withheld and continued to unlawfully withhold possession of the said land from this plaintiff up to and until the 27th day of February, 1877, without any right or title to the same or any part thereof.

IV.

That the said defendant, Daniel McCusker, had and received the use, rents, and profits of said land, the property of this plaintiff, during the time aforesaid, to the value and amount, as plaintiff is informed and believes, of one thousand dollars.

V.

That notwithstanding that, and while this plaintiff was and is, so as aforesaid, seized in fee and entitled to the possession of the said land, the said defendant, Franklin McCusker, on the 27th day of February, 1877, unlawfully claiming title thereto by virtue of a certain pretended deed of conveyance of the said land to him from the said defendant, Daniel McCusker, entered into and upon the said land and unlawfully withheld and continued to unlawfully withhold possession of the same from this plaintiff up to and until the 25th day of April, 1877, without any right or title to the same or any part thereof.

4

VI.

That the said defendant, Franklin McCusker, had and received the use, rents, and profits of said land, the property of this plaintiff, during the time last aforesaid, to the value and amount, as this plaintiff is informed and believes, of one hundred dollars.

VII.

That notwithstanding that, and while this plaintiff was and is, so as aforesaid, seized in fee and entitled to the possession of the said land, the said defendant, Tillatha C. McCusker, on the 25th day of April, 1877, unlawfully claiming title thereto by virtue of a certain pretended deed of conveyance of the said land to her from the said defendant, Franklin McCusker, entered into and upon the said land and unlawfully withheld, and has ever since unlawfully withheld, and does now unlawfully withhold possession of the said land from this plaintiff without any right or title to the same or any part thereof.

VIII.

That the said defendant, Tillatha C. McCusker, has had and received the use, rents, and profits of the said land, the property of this plaintiff, ever since the said 25th day of April, 1877, and
5 still has and receives the use, rents, and profits of said land, to the damage of this plaintiff in the sum of two thousand (2,000) dollars.

IX.

That the said defendants, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as register of the State land office of the State of California, pretend to claim or to have some title to, interest in, or liens upon the said land adverse to this plaintiff, which said pretented titles, interests, or liens are, and each of

them is, unlawful and derived from, through, or under the said defendants, Daniel McCusker, Franklin McCusker, and Tillatha C. McCusker, or by reason of their unlawful possession as aforesaid.

Wherefore plaintiff demands judgment—

1st. Against all of the said defendants that they surrender possession of the said land to this plaintiff; and,

2nd. A further judgment against the defendant, Daniel McCusker, for the sum of $1,000 and interest thereon from the said 27th day of February, 1877, besides the costs of this action, or a due and proper part thereof; and,

3rd. A further judgment against the defendant, Franklin
6 McCusker, for the sum of $100 and interest thereon from the 25th day of April, 1877; and,

4th. A further judgment against the defendant, Tillatha C. McCusker, for the sum of $2,000, besides the costs of this action, or a due and proper part thereof.

HAMMOND & WRIGHT,
Attorneys for Plaintiff.

(Endorsed:) Complaint. Filed Dec. 26th, 1879. John Markley, clerk, by John H. Garber, deputy.

Demurrer.

(Title of court and cause.)

And now comes defendant, Tillatha B. McCusker, and demurs to the complaint herein on the following grounds, viz:

1st. Said complaint does not state facts sufficient to constitute a cause of action.

2nd. It appears from said complaint that there is a misjoinder of parties defendants herein in this, that it appears that none of the codefendants of this defendant are necessary or proper parties herein.

7 Wherefore such defendant prays judgment for costs.

S. F. LEIB,
Att'y for Def't, Tillatha B. McCusker.

(Endorsed:) Demurrer. Filed Dec. 31, 1879. John Markley, clerk.

Order Sustaining Demurrer.

(Title of court and cause.)

MONDAY, *Feb. 16th*, 1880.

The demurrers on file are submitted and taken under advisement by the court, and by the court sustained. Plaintiff allowed to amend his complaint on file herein within twenty days. (Copy of minutes, Book "A," page 31.)

Amended Complaint.

(Title of court and cause.)

The said plaintiff, by Hammond & Wright, its attorneys, for its amended complaint in this action, alleges—

8 I.

Thate said plaintiff and the defendant, The Bank of Watsonville, are, and were at all times hereinafter mentioned, respectively, corporations duly incorporated and existing under and by virtue of the laws of the State of California.

II.

That on the 9th day of October, 1875, this plaintiff was, has ever since been, and now is seized in fee and entitled to the possession of that certain tract of land situated in the county of Monterey, State of California, known and described as follows: "South of base line and east of Mount Diablo meridian, township 12, range 2, lot numbered IV of southwest quarter, and southeast quarter of southwest quarter of section thirty-one, containing ninety-two acres and fifty hundredths of an acre."

III.

That the said defendants severally claim to have some title to, interests in, or liens upon the said lands adverse to this plaintiff, which said pretended titles to interests in, and liens upon the said lands are, and each of them is, unlawful; and that neither
9 the said defendants nor any nor either of them have now or ever have had any title to, interests in, or liens upon said land whatever or any part thereof.

Wherefore this plaintiff prays—

1st. That the defendants may be required to set forth the nature of their respective claims upon or against the said land, and that the same may be determined by judgment or decree of this court.

2nd. That by said judgment or decree it be adjudged that neither the said defendants nor any nor either of them have any title to, interests in, or liens upon the said land or any part thereof, and that the title of the plaintiff is good and valid.

3rd. That by said judgment or decree the said defendants and each of them be enjoined and debarred from asserting any claim whatever upon said land adverse to this plaintiff, and adjudged to pay the costs of this action, and that this plaintiff may have such further or other relief as to this honorable court shall seem meet and agreeable to equity.

HAMMOND & WRIGHT,
Attorneys for the Plaintiff.

10 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Charles Crocker, being duly sworn, says as follows:

1. I am an officer of the Southern Pacific Railroad Company of California, to wit, the president thereof.

2. I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

3. The grounds of my belief are information communicated to me by the agents of the said corporation.

CHAS. CROCKER.

Subscribed and sworn to before me this 4th day of March, A. D. 1880.

[SEAL.] HARRY T. HAMMOND,
Notary Public.

(Endorsed:) Amended answer. Filed March 5th, 1880. M. L. Dexter, clerk, by B. E. Cahoon, deputy clerk.

11 *Demurrer to Amended Complaint.*

(Title of court and cause.)

The defendants, Franklin McCusker and Tillatha C. McCusker, demur to the pretended amended complaint herein on the grounds—

I.

That the same does not state facts sufficient to constitute a cause of action.

II.

The same does not in any proper sense, or at all, constitute an amended complaint herein, but seeks to change an action at law, to wit, an action of ejectment and for mesne profits, into an action in equity, to wit, an action to quiet title.

Wherefore said defendants pray judgment for their costs.

S. F. LEIB,
Att'y for Def'ts, Franklin and Tillatha McCusker.

STATE OF CALIFORNIA, } ss:
County of Santa Clara, }

S. F. Leib, being sworn, on his oath states that on March 16th, 1880, he deposited a copy hereof in the post office at San Jose, Cal., wherein was his place of business, with postage thereon pre-
12 paid, directed to Messrs. Hammond & Wright, 16 and 17 Nevada Block, San Francisco, Cal., where they have their place of business, and between which places there is a daily communication by mail.

S. F. LEIB.

Subscribed and sworn to before me this 16th day of March, A. D. 1880.

[SEAL.] JNO. E. RICHARDS,
Notary Public.

(Endorsed:) Demurrer to amended complaint. Filed March 17th, 1880. M. L. Dexter, clerk, by B. E. Cahoon, deputy clerk.

Order Overruling Demurrer.

(Title of court and cause.)

MONDAY, *April 26th*, 1881.

The demurrer of Franklin and Tillatha C. McCusker and of Thos. Beck and Watsonville Bank to amended complaint is by the court overruled and 20 days given to answer. (Copy of minutes, Book "A," page 88.)

13 *Answer to Amended Complaint.*

(Title of court and cause.)

And now come T. C. and F. McCusker, two of the defendants herein, and, answering plaintiff's amended complaint herein, deny that on the 9th day of October, 1875, or at any other time or at all, plaintiff was or since has been, or now is seized in fee, or at all, or entitled to the possession of the land claimed in plaintiff's complaint herein, or any part thereof; and, further answering, said complaint, said defendants deny that the title, interest, or lien of said defendants, or either or any of them, in or to said land is unlawful, or that said defendants, or any or either of them, have not now or never have had any title to, interest in, or lien upon said land, but, on the contrary, aver that said defendants are now, and at the commencement of this action were, the owners in fee simple and entitled to the possession of said land and every part thereof.

II.

And said defendants, for a further and separate defense to this action, aver, on information and belief, that said plaintiff has not since the first day of January, A. D. 1878, filed in the office
14 of the county clerk of Monterey county, California, a copy of the copy of its articles of incorporation, filed in the office of the secretary of state, certified by such secretary of state.

Wherefore said defendants pray judgment for their costs.

S. F. LEIB,
Att'y for Def'ts, T. C. and F. McCusker.

STATE OF CALIFORNIA, } ss:
County of Monterey, }

Mrs. T. C. McCusker, being duly sworn, on her oath states that she is one of the defendants above named; that she has heard read the foregoing answer and knows the contents thereof, and that the same

is true of her own knowledge, except as to the matters therein stated upon information or belief, and as to those matters she believes it to be true.

T. C. McCUSKER.

Subscribed and sworn to before me this June 23d, 1880.

[SEAL.] A. S. KITTREDGE,
Notary Public.

(Endorsed:) Answer to amended complaint. Filed June 25th, 1880. M. L. Dexter, clerk, by B. E. Cahoon, deputy clerk.

15 *Findings.*

(Title of court and cause.)

This cause came on regularly for hearing and trial upon the answers of defendants, Tillatha C. McCusker, Franklin McCusker, The Bank of Watsonville, and Thos. Beck, the defendants, Daniel McCusker, John Thompson, and Wm. Minis, as register of the land office of the State of California, although duly served with summons and complaint herein, having failed to answer, and their defaults therefor having been duly and regularly entered herein, Messrs. Hammond & Wright appearing as counsel for plaintiff, S. F. Leib, Esq., for Tillatha and Franklin McCusker, and Messrs. Kittredge & Halsted for the Bank of Watsonville and Thomas Beck. A trial by jury was expressly waived by the respective parties, and said action was tried by the court sitting without a jury and submitted to the court for its consideration and decision, and after due deliberation I find from the testimony offered and introduced the following facts to be established by the evidence on the trial:

Facts.

I.

16 That prior to and on the 9th day of October, 1875, the plaintiff was, has been ever since, and now is a corporation duly incorporated under the laws of the State of California.

II.

That on the 16th day of June, 1876, a copy of the copy of the articles of incorporation of the plaintiff, filed in the office of the secretary of state of the State of California, duly certified by such secretary of state, was filed in the office of the clerk of the county of Monterey.

III.

That by virtue of an act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27th, 1866, and a joint resolution of Congress, approved June 28th, 1870, a patent of the United States was duly issued to the

plaintiff on the 9th day of October, 1875, for the following-described land, situated in said county of Monterey, State of California, to wit: "South of base line and east of Mount Diablo meridian, township twelve, range two, lot numbered IV, of southwest quarter, and southeast quarter of southwest quarter of section 31, containing ninety-two acres and fifty-hundredths of an acre."

17 IV.

That the plaintiff was owner in fee simple of all the above-described land, and continued as such owner to and through the trial of this action.

V.

That all of the defendants claimed some estate, right, title, and interest therein adverse to the said plaintiff, but that neither said defendants nor either of them has any estate, right, title, or interest whatever in or to the said land or any part thereof.

And I do find and decide, upon the foregoing facts, the following conclusions of law:

1. That the plaintiff is entitled to maintain this action to quiet the title of above-described property, which is in the county of Monterey.

2. That the plaintiff was on the 9th day of October, A. D. 1875, has been ever since, and now is the owner in fee simple and entitled to the possession of all the land described in the complaint.

3. That neither one of said defendants has any right, title, or interest in or to said land or any part thereof.

4. That the plaintiff is entitled to a decree as prayed for in
18 the complaint to quiet his title to said land against said defendants and each of them and all persons claiming or to claim the same or any part thereof under or through the said defendants or either of them.

5. That the plaintiff is entitled to a judgment for costs, to be taxed against only the defendants who have answered herein contesting plaintiff's rights.

And judgment is hereby ordered to be entered accordingly. Twenty days' stay granted.

Feb. 3d, 1881.

JOHN K. ALEXANDER,
Judge of the Superior Court, Monterey County, California.

(Endorsed:) Findings. Filed Feb. 3d, 1881. M. L. Dexter, clerk, by B. E. Cahoon, deputy clerk.

Judgment.

(Title of court and cause.)

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law and the decision

thereon in writing having been duly rendered by the court,
19 which are now on file in this cause, wherein judgment was awarded in favor of the Southern Pacific Railroad Company of California, plaintiff, against all of the defendants, and for costs against such of the defendants only as have answered contesting the plaintiff's rights in the premises, on motion of H. T. Hammond, Esq., plaintiff's attorney, it is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint herein, against the defendants and each and all of them; that all adverse claims of the defendants and each of them and all persons claiming or to claim said premises or any part thereof through or under said defendants or either of them are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff be, and he is hereby, declared and adjudged to be the true and lawful owner of the land described in the complaint and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants, or either of them, who are hereby perpetually estopped from setting up any claims thereto or any part thereof.

Said premises are bounded and described as follows, in the county of Monterey, State of California, to wit: "South of base line and east of Mount Diablo meridian, township twelve, range 2, lot
20 number IV of southwest quarter, and southeast quarter of southwest quarter of section 31, containing ninety-two acres and fifty-hundredths of an acre."

And it is hereby ordered, adjudged, and decreed that the plaintiff do have and recover costs of this action against the following-named defendants: Tillatha McCusker, Franklin McCusker, Thomas Beck, and the Bank of Watsonville, taxed at $59.45.

JOHN K. ALEXANDER,
Judge of Superior Court of Monterey Co., Cal.

(Endorsed:) Decree. Filed Feb. 3d, 1881. M. L. Dexter, clerk, by B. E. Cahoon, deputy clerk.

Notice of Intention to Move for a New Trial.

(Title of court and cause.)

To the plaintiff above named and Messrs. Hammond & Wright, its attorneys:

You will please take notice that the defendants, Tillatha McCusker and Frank McCusker, herein, intend to and will move the above-named court to vacate and set aside its judgment entered in
21 the above-entitled action against said defendants, and to grant said defendants a new trial in said action. Said motion will be made upon the following grounds, namely:

1st. Insufficiency of the evidence to justify the said decision.

2nd. Errors in law occurring at the trial of said action and excepted to by said defendants.

3rd. That said decision is against law.

Said motion will be made upon a statement of the case to be prepared by said defendants.

S. F. LEIB,
Att'y for said Def'ts, Tillatha and Frank McCusker.

(Endorsed:) Notice of intention to move for a new trial. Filed March 17th, 1881. M. L. Dexter, clerk.

Statement of the Case on Motion for a New Trial.

(Title of court and cause.)

Upon the trial of this case the only evidence introduced to
22 prove the allegation that plaintiff is or ever was a corporation was a certified copy of a document purporting to be articles of consolidation between what by said articles purported to be two previously-existing corporations.

It was this certified copy of said document which was filed in the office of the county clerk of Monterey county on June 16th, 1876, referred to in the findings, and nothing else in the way of articles of incorporation was ever filed in said county clerk's office having any reference to the plaintiff herein or to either of the supposed previously-existing corporations.

That the date of such articles of consolidation is subsequent to the year 1870, but previous to the year 1875.

A copy of said articles, hereinbefore referred to, is hereto attached and marked "Exhibit A," and are made a part of this statement.

The only evidence which plaintiff introduced to support the allegation of title was a patent from the United States to plaintiff covering the land in controversy and purporting to be issued in pursuance of the act of Congress, approved July 27th, 1866. An extract from the material part of said patent pertaining to the title in question is hereto attached and marked "Exhibit B," and is made a part of this statement.

23 And it was proved by plaintiff that the State had never filed in the U.S. surveyor general's office its segregation map or survey of swamp lands of sect. 31, t's'p 12 S., R. 2 east, and that the U. S. surveyor general of California had filed in said office a plat of said t's'p; that the same was approved July 19th, 1867, afterwards amended and approved Aug. 31st, 1872, and that sect. 31 was returned as high lands and has never been changed from that character.

But said articles of consolidation gave the supposed corporation, thereby purported to be formed, no power, and it was not specified therein as its object to receive or acquire any land except such as should be necessary for its track, switches, depots, and buildings, and it was proved and admitted that this land in controversy was not used or capable of being used for any such purposes.

It was admitted by the defendant that the value of the rents, issues, and profits of said land for said time was $180.00.

On behalf of the defense the following evidence was introduced: A patent in due form from the State of California to Daniel McCus-

ker, purporting to grant to him the land in dispute as swamp and overflowed land. It was proved and admitted that thereafter, but before the commencement of this action, defendant, Tillatha
24 C. McCusker, acquired her interest in said premises. This patent was dated and issued in 1868. It was admitted by counsel for plaintiff and proved that over one-half of each governmental subdivision of such premises was and always had been swamp and overflowed land, and was rendered thereby unfit for cultivation. No other evidence was introduced tending to prove or illustrate the truth or falsity of the following

Specifications.

The defendant specifies the following particulars in which the evidence is insufficient to justify the findings or decision herein, viz:

1st. The evidence is insufficient to justify the finding that plaintiff is or ever was a corporation.

2nd. The evidence is insufficient to justify the finding that plaintiff filed in the office of the county clerk of Monterey county a copy or a copy of a copy of articles of incorporation.

3rd. The evidence is insufficient to justify the finding that a copy or a copy of a copy of such articles of incorporation have remained or ever have been on file in the office of said county clerk.

25 4th. The evidence is insufficient to justify the finding that a patent for the premises in dispute, or any part thereof, was ever duly issued by the United States to plaintiff, or was ever issued at all, under or by virtue of an act or resolution of the Congress of the United States of America.

5th. The evidence is insufficient to justify the finding that *that* plaintiff is the owner of the premises described in the complaint.

6th. The evidence is insufficient to justify the finding that plaintiff is or ever was at any time the owner of said premises or any part thereof.

7th. The evidence is insufficient to justify the finding that plaintiff was at the commencement of this action the owner of said premises or any part thereof, or of any interest therein.

And defendant prays that the foregoing statement of the case may be settled, allowed, and signed, and that thereupon the same be made a part of the files and records herein.

EXHIBIT "A."

STATE OF CALIFORNIA, DEPARTMENT OF STATE.

I, D. M. Burns, secretary of state of the State of California,
26 do hereby certify that I have compared the annexed copy of articles of association, amalgamation, and consolidation with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and the great seal of State, at office, in Sacramento, California, the 9th day of August, A. D. 1881.

[SEAL.] D. M. BURNS,
Secretary of State.

Articles of association, amalgamation, and consolidation made and executed this 17th day of December, A. D. 1874, by and between the Southern Pacific Railroad Company, of the first part, and the Los Angeles and San Pedro Railroad Company, party of the second part, witnesseth:

That whereas the said party of the first part heretofore, to wit, on the 19th day of August, A. D. 1873, was duly incorporated and organized under the laws of the State of California by the amalgamation and consolidation of the following railroad corporations theretofore existing under laws of said State, to wit, the San Francisco and San Jose Railroad Company, the Santa Clara and
27 Pajaro Railroad Company, the Southern Pacific Railroad Company, the California Southern Railroad Company, and the Southern Pacific Branch Railroad Company, all of said railroad companies being incorporated and duly organized under the laws of the State of California prior to the 31st day of December, A. D. 1872, pursuant to articles of amalgamation and consolidation of that date by them agreed upon, which by virtue of the law of said State entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved May 20th, 1861, whereby said corporation became duly incorporated and organized under the laws of said State, for the purposes of purchasing, constructing, owning, maintaining, and operating continuous lines of railroad from the city and county of San Francisco, in the State of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego to some point on the Colorado river in the southeastern part of the State of California, a distance of six hundred and thirty-five and $\frac{87}{100}$ miles, as near as may be; also a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, a distance of
28 three hundred and fifty-six and $\frac{7}{100}$ miles, as near as may be; also a line of railroad from the town of Gilroy, in the county of Santa Clara, in said State, passing through said county and the counties of Santa Cruz and Monterey, to a point at or near Salinas City, in said last-named county, a distance of thirty-five and $\frac{1}{10}$ miles, as near as may be; and also such branches to said lines as the board of directors of said corporation may consider advantageous to said corporation and direct to be established; and also from a point on said road aforesaid at or near Salinas City, in the county of Monterey, southerly to a point in Kern county south of Tulare Lake, intersecting the San Joaquin division of the said Southern Pacific railroad; also from a point on the above-described line at or near San Miguel, in San Luis Obispo county, thence in a southerly direction to a point of intersection in Los Angeles county with the line of the said Southern Pacific railroad, running from Tehachapa Pass, by way of Los Angeles, to Fort Yuma; said roads passing into or through the counties of Monterey, San Luis Obispo, Kern, Santa Barbara, and Los Angeles, and said roads, in the aggregate, being as near as may be, four hundred and two (402) miles in length;

And whereas the said party of the second part was heretofore, to wit, on the 18th day of February, A. D. 1868, duly incorporated
29 and organized under the laws of the State of California for the purpose of constructing, owning, and maintaining and operating a railroad from a point in the city of Los Angeles, in the county of Los Angeles, State of California, to a point on or near the Bay of San Pedro, in said county, a distance of twenty and $\frac{5}{10}$ miles;

And whereas said parties believe a consolidation and amalgamation of their capital stock, debts, properties, assets, roads, telegraphs, lands, and franchises will be mutually advantageous;

And whereas more than three-fourths in value of the stockholders in interest of each of said parties have consented, in writing, to such amalgamation and consolidation upon the terms and conditions hereinafter set forth;

And whereas all of the railroad corporations included in the several consolidations were duly incorporated prior to the 31st day of December, A. D. 1872:

Now, therefore, under and by virtue of the fortieth section of a law of the State of California, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof and other matters relating thereto," approved May 20th, 1861, and the several amendments thereto, the said parties do
30 hereby mutually covenant and agree each with the other to the following articles, to wit:

Article first.

Said parties do hereby amalgamate and consolidate themselves into a new corporation, under the name and style of the Southern Pacific Railroad Company, which new corporation shall continue in existence for the period of fifty years from the date of these articles; and they do further consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims, and demands of every kind whatsoever, as well in possession as in expectancy, at law or in equity, and do grant, convey, and vest the same in the said new corporation as fully as the same are now severally held and enjoyed by them, respectively, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, judgments, claims, and charges thereon, or in anywise affecting the same or any part thereof.

Article second.

The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate the several lines of railroads hereinbefore decribed, to wit, continuous lines of
31 railroad from the city and county of San Francisco, in the State of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado river, in the southeastern part of the State of California, a distance of six hundred and thirty-five and $\frac{87}{100}$ miles, as near as

may be; also a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, a distance of three hundred and fifty-six and $\frac{7}{10}$ miles, as near as may be; also a line of railroad from the town of Gilroy, in the county of Santa Clara, in said State, passing through said county and the counties of Santa Cruz and Monterey to a point at or near Salinas City, in said last-named county, a distance of thirty-five $\frac{1}{10}$ miles, as near as may be; and also such branches to said lines as the board of directors of said corporation may consider advantageous to said corporation and direct to be established; and also from a point on said road aforesaid at or near Salinas City, in the county of Monterey, southerly to a point in Kern county south of Tulare Lake, intersecting the San Joaquin division of the said Southern Pacific railroad; also from a point on the above-
32 described line at or near San Miguel, in San Luis Obispo county; thence in a southerly directiog to a point of intersection in Los Angeles county with the line of the said Southern Pacific railroad, running from Tehachapa Pass, by way of Los Angeles, to Fort Yuma; said roads passing into or through the counties of Monterey, San Luis Obispo, Kern, Santa Barbara, and Los Angeles, and said roads in the aggregate being, as near as may be, four hundred and two miles in length; also from a point in the city of Los Angeles, in the county of Los Angeles, State of California, to a point on or near the Bay of San Pedro, in said county, a distance of twenty and one-half miles, the aggregate length of all of said railroads being one thousand four hundred and forty-nine and fifty-four one-hundredths miles.

Article third.

The board of directors of said new corporation shall consist of seven persons, and the following-named persons shall act as such directors until their successors shall have been duly elected pursuant to the by-laws of said new corporation hereafter to be adopted, viz., Charles Crocker, David D. Colton, E. H. Miller, Jr., Robert Robinson, Nicholas T. Smith, Stephen T. Gage, and Joseph L. Willcutt.

33 Article fourth.

The capital stock of said new corporation shall be ninety millions dollars, divided into nine hundred thousand shares of one hundred dollars each, that sum being the contemplated actual cost of said railroads, including telegraph lines, rolling stock, motive power, shops, depots, etc.

Article fifth.

Each stockholder of each of said parties shall have the same number of shares of the capital stock of the new corporation which he now owns and holds of the capital stock of his respective company upon the same terms and conditions, and shall be entitled to receive from said new corporation certificates therefor where the same has

been fully paid up upon the surrender of the certificates now held by him, and where the same has not been fully paid up he shall receive such other evidence of his ownership as the board of directors of said new corporation shall direct upon the surrender of such evidence of his ownership of such unpaid stock as he may now hold.

Article sixth.

And the said several parties of the first and second parts,
34 each for itself, hereby sells, assigns, transfers, grants, bargains, releases, and conveys to the said new consolidated company and corporation, its successors and assigns, forever all its property, real, personal, and mixed, of every kind and description, all its capital stock, all its interest in the shares of its capital stock subscribed but not fully paid up, all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description, and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon or in anywise affecting the same.

Article seventh.

The said new and consolidated company and corporation is to be liable for and shall fulfill, perform, do, and pay all and each of the contracts and agreements, covenants, duties, obligations, liabilities, debts, dues, and demands of the said several parties of the first and second parts, but this amalgamation and consolidation shall not in any way relieve the said parties of the first and second parts or the stockholders thereof from any and all just liabilities.

35 In testimony whereof the said party of the first part has caused this instrument to be signed by its president and secretary and its corporate seal to be hereunto affixed, and the said party of the second part has caused this instrument to be signed by its president and secretary and its corporate seal — hereunto affixed, in pursuance of orders and resolutions of their several boards of directors made on the seventeenth day of December, A. D. 1874.

[Seal S. P. R. R. Co.]

SOUTHERN PACIFIC RAILROAD COMPANY,
By CHAS. CROCKER, *President.*
J. L. WILLCUTT, *Secretary.*

[Seal L. A. & S. P. R. R. Co.]

LOS ANGELES & SAN PEDRO RAILROAD COMPANY,
By LELAND STANFORD, *President.*
J. L. WILLCUTT, *Secretary.*

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest

of the said Southern Pacific Railroad Company, party of the first part to the foregoing new articles of association amalgamating and consolidating the said parties of the first and second parts,
36 hereby consent to such amalgamation and consolidation and to the said new articles of association this seventeenth day of December, A. D. 1874.

CHAS. CROCKER.
S. T. GAGE.
N. T. SMITH.
DAVID D. COLTON.
E. H. MILLER, JR.
J. L. WILLCUTT.
ROBERT ROBINSON.
MARK HOPKINS.
LELAND STANFORD.
C. P. HUNTINGTON,
By MARK HOPKINS, *Att'y-in-Fact.*
CONTRACT AND FINANCE CO.,
By JNO. MILLER, *Secretary.*

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said Los Angeles and San Pedro Railroad Company, party of the second part to the foregoing new articles of association amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolida-
37 tion and to the said new articles of association this seventeenth day of December, A. D. 1874.

LELAND STANFORD.
CHAS. CROCKER.
DAVID D. COLTON.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS, *Att'y-in-Fact.*
ROBERT ROBINSON.
J. L. WILLCUTT.
CONTRACT AND FINANCE CO.,
By JNO. MILLER, *Secretary.*

Filed in the office of the secretary of state December 18th, 1874.
DRURY MELONE,
Secretary of State,
By U. E. WHITE.

Recorded, book 9, page 354.

EXHIBIT "B."

Abstract of Patent from United States to the Southern Pacific Railroad Company of California.

The United States of America to all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 27th, 1866,
38 and joint resolution of June 28th, 1870, "To aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to secure to the Government the use of the same for postal, military, and other purposes," authority is given to the Southern Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a railroad and telegraph line, under certain conditions and stipulations expressed in said act, from the city of San Francisco to a point of connection with the Atlantic and Pacific railroad near the boundary line of said State, and provision is made for granting to the said company "every alternate section of public land, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad on the line thereof and within the limits of twenty miles on each side of said road" not sold, reserved, or otherwise disposed of by the United States, and to which pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed;

And whereas it is further provided by said act that "whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of other lands shall be selected
39 by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections and not included in the numbers;"

And whereas official statements, bearing dates August 17th and October 26th, 1871, October 2d, 1872, August 9th, 1873, and October 26th, 1874, from the Secretary of the Interior, have been filed in the General Land Office, showing that the commissioners appointed by the President under the provisions of the fourth section of the said act of Congress approved July 27th, 1866, have reported to him that the line of railroad and telegraph from San Jose to Gilroy and thence to a point in township thirteen south, range six east, and from Goshen, the point of junction of said road with the San Joaquin Valley branch of the Central Pacific Railroad, in the northwest corner of section two, township twenty-five south, range twenty-five east, to the northeast quarter of section nine, township twenty-eight south, range twenty-six east, making one hundred and ten miles of road, have been constructed and fully completed and equipped in the manner prescribed by the said act of Congress, and that the president of the "Southern Pacific" Railroad Company has
40 applied for a conveyance of the title to the lands granted to said company by the said act of Congress, July 27th, 1866.

And further showing that copies of the reports of said commissioners have been filed in the Department of the Interior, with copies of the order of the President of the United States, dated January 19th and October 23d, 1871, October 1st, 1872, August 6th, 1873, and October 26th, 1874, under authority conferred upon him by the fourth section of the act of July 27th, 1866, of the completion of the first, second, third, fourth, and fifth sections of twenty-two miles each of said railroad and telegraph line;

And whereas certain tracts have been selected under the act aforesaid by Benjamin B. Redding, land agent of the "Southern Pacific Railroad Company," as shown by his original lists of sections, dated July 28th, 1875, and certified July 29th, 1875, by the register and receiver at San Francisco, California, the said tract being described as follows, to wit:

South of base line and east of Mount Diablo meridian, * * * township twelve, range two, * * * "lot numbered IV of southwest quarter, and southeast quarter of southwest quarter of section thirty-one, containing ninety-two acres and fifty-hundredths of an acre:"

Now know ye that the United States of America, in con-
41 sideration of the premises and pursuant to the said act of Congress, have given and granted and by these presents do give and grant unto the said Southern Pacific Railroad Company of California, and to its successors and assigns, the tracts of land above described, mineral land excepted:

To have and hold the same, together with all rights, privileges, and appurtenances of whatever nature thereunto belonging, unto the said Southern Pacific Railroad Company of California and to its successors and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[Seal U. S. General Land Office.]

By the President: U. S. GRANT,
By D. D. CONE, *Secretary.*

L. K. LIPPINCOTT,
Recorder of the General Land Office.

42 I, J. K. Alexander, judge of the superior court of the county of Monterey, and before whom the above proceedings were taken and had, do hereby certify that the statement hereinabove set out has been duly settled by me, and that the same is correct and hereby allowed.

Witness my hand this 23d day of December, A. D. 1881.

JOHN K. ALEXANDER, *Judge.*

(Endorsed:) Statement on motion for a new trial. Filed Dec. 23d, 1881. M. L. Dexter, clerk.

Order Denying Motion for New Trial.

(Title of court and cause.)

Defendant's motion for a new trial herein, heretofore argued and submitted, is by the court denied. (Copy from minutes, Book "A," page 602.)

Order Substituting Defendant.

(Title of court and cause.)

On reading and filing affidavit of Thomas Walker and on
43 evidence submitted, it appearing to the court that the entire interest of the defendant, Tillatha C. McCusker, in the premises affected by this controversy has been transferred to said Thomas Walker: Now, on motion of A. S. Kittredge, Esq., attorney for said Walker, it is ordered that said Thomas Walker be, and he is hereby, substituted as defendant in this action in the place of said Tillatha C. McCusker.

January 25th, 1882.

JOHN K. ALEXANDER,
Judge of Superior Court of Monterey County.

(Endorsed:) Order substituting defendant. Filed January 25th, 1882. M. L. Dexter, clerk.

(Endorsed:) Mailed a certified copy of the within order this 26th day of January, 1882, to Messrs. Hammond & Wright, No. 318 Pine St., San Francisco, Cal., postage prepaid. M. L. Dexter, clerk.

Notice of Appeal.

(Title of court and cause.)

You will please take notice that the defendant in the above-
44 entitled action, to wit, Thomas Walker, substituted as defendant in place of defendant, Tillatha C. McCusker, does hereby appeal to the supreme court of the State of California from the judgment therein rendered and entered in said superior court on February 3d, 1881, in Judgment Book "A," pages 224 and following, in favor of the plaintiff in said action and against defendants, Bank of Watsonville, Tillatha C. McCusker, and others, and from the whole thereof, and also from the order denying said defendants' motion for a new trial, made and entered in the minutes of said court on the 9th day of January, A. D. 1882.

A. S. KITTREDGE,
Att'y for Thomas Walker.

To the clerk of said superior court and Messrs. Hammond & Wright, att'y for plaintiff.

STATE OF CALIFORNIA, } ss:
County of Santa Cruz, }

A. S. Kittredge, being first duly sworn, says: I am attorney for the defendant, Thomas Walker, in the above-entitled action, and reside and have my office in Watsonville, Santa Cruz Co., California; Messrs. Hammond & Wright are plaintiff's attorneys in said action, and reside and have their office at 318 Pine St., city of San Francisco, California; between said two places is regular daily
45 communication by U. S. mail. I served the foregoing notice of appeal on said Hammond & Wright on January 30th, 1882, by depositing a copy thereof in the U.S. post office at said Watsonville on that day, addressed to said Hammond & Wright, No. 318 Pine street, San Francisco, California, postage prepaid, and before the departure of said mail on that day.

A. S. KITTREDGE.

Subscribed and sworn to before me January 30th, A. D. 1882.
[SEAL.] J. L. HALSTED,
Notary Public.

(Endorsed:) Notice of appeal. Filed Jan. 30th, 1882. M. L. Dexter, clerk.

Clerk's Certificate.

STATE OF CALIFORNIA, } ss:
County of Monterey, }

(Title of court and cause.)

I, M. L. Dexter, county clerk of said Monterey county and *ex officio* clerk of the superior court of said Monterey county, State of
46 California, do hereby certify that the foregoing are full, true, and correct copies of originals on file and of record in my office in said cause, and that the foregoing constitutes the transcript on appeal from the judgment in favor of plaintiff and from the order of the court denying defendants' motion for a new trial in said cause, and is correct; and I hereby further certify that an undertaking on appeal in due form has been properly filed by said defendant and appellant within the statutory time in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court the 14th day of March, A. D. 1882.

[COURT SEAL.] M. L. DEXTER, *Clerk,*
By —— ——, *Deputy Clerk.*

47 *Submission of Cause.*

In the Supreme Court of the State of California, Department One.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA
v.
DANIEL MCCUSKER *et al.* } No. 8333.

MARCH 4, 1885.

Ordered cause stand submitted.

48 *Judgment.*

In the Supreme Court of the State of California, Department One.

THE SOUTHERN PACIFIC RAILWAY CO. OF CALIFORNIA, Respondent, *vs.* DANIEL MCCUSKER *et als.*, Appellants. } No. 8333.

On appeal from the superior court in and for the county of Monterey.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Ross, J.

I concur in the judgment.

McKINSTRY, *J.*

I concur.

McKEE, *J.*

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Monterey in the above-entitled cause be, and the same are hereby, reversed, with costs, and cause remanded for a new trial.

49 *Opinion.* (*Filed May* 25, 1885.)

In the Supreme Court of the State of California, Department One.

SOUTHERN PACIFIC RAILROAD COMPANY *vs.* MCCUSKER. } No. 8333.

If, in an action of ejectment based on a patent purporting to have been issued in pursuance of the grant by Congress to the railroad company, it is competent for the defendant to attack the validity of the patent on the ground that the land embraced in it was included within the exterior limits of a tract of land claimed as a Mexican grant, and therefore excepted from the congressional grant, as was held by a majority of this court in McLaughlin *vs.* Heid, reported in 63 Cal., 208, it is competent, in an action to quiet title based on a similar patent, for the defendant to show that the land included in it was swamp and overflowed land, and therefore excepted from the congressional grant. In the case at bar it was admitted by the respective parties that over one-half of each governmental subdivision of the land in controversy was and always has been swamp and overflowed land, and thereby rendered unfit for cultivation. The case of McLaughlin *vs.* Heid is binding on us, and, on the authority of that case, we must reverse the judgment and order of the court below.

Judgment and order reversed and cause remanded for a new trial.

ROSS, *J.*

I concur in the judgment.

McKINSTRY, *J.*

I concur.

McKEE, *J.*

50 *Bond.*

In the Supreme Court of the State of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA, Plaintiff & Respondent,
against
DANIEL MCCUSKER, TILLATHA C. MCCUSKER, His Wife; Thomas Walker, Franklin McCusker, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as Register of the State Land Office of the State of California, Defendants. } No. 8333.

Know all men by these presents that we, Charles F. Crocker, of the city and county of San Francisco, State of California, and E. H. Miller, Jr., of the town and county of Alameda, State of California, are held and firmly bound unto Daniel McCusker, Tillatha
51 C. McCusker, his wife; Thomas Walker, Franklin McCusker, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as register of the State land office of the State of California, the defendants in the above-entitled action, in the sum of one thousand dollars gold coin of the United States; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 13th day of June, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the Southern Pacific Railroad Company of California, plaintiff and respondent in the above-entitled action, has prosecuted a writ of error from the Supreme Court of the United States to the said supreme court of the State of California, upon the judg-
52 ment rendered by said last-named court in the above-entitled cause in favor of the defendants or some of them against the said plaintiff:

Now, therefore, the condition of this obligation is such that if the said plaintiff in error shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise to remain of full force and effect.

CHAS. F. CROCKER.
E. H. MILLER, JR.

Signed, sealed, and delivered in presence of—
CHARLES J. TORBERT.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles F. Crocker and E. H. Miller, Jr., being severally duly sworn, each for himself deposes and says that he is a resident and freeholder within the State of California, and one of the
53 obligors named in and who executed the foregoing bond; that he is worth the sum of two thousand dollars over and

above all his debts and liabilities and exclusive of property exempt by law from execution.

CHAS. F. CROCKER.
E. H. MILLER, JR.

Severally subscribed and sworn to by the said Charles F. Crocker and E. H. Miller, Jr., on this thirteenth (13th) day of June, A. D. 1885, before me—

[NOTARIAL SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

I do hereby approve the foregoing bond both as to sufficiency of security and as to form and manner of execution.

Dated 15th June, 1885.

McKEE, *Acting C. J.*

Endorsed: Filed June 15th, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

54 In the Supreme Court of the United States.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA
v.
DANIEL MCCUSKER, TILLATHA C. MCCUSKER, His Wife; Franklin McCusker, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as Register of the State Land Office of the State of California. } No. 8333.

—— of —— term, in the year of our Lord one thousand eight hundred and eighty-five.

Afterwards, to wit, on the first Monday of ——, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The South-
55 ern Pacific Railroad Company of California, by John A. Wright, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit: That it was not competent for the defendants to show that the land embraced by the United States patent, valid on its face, was swamp or overflowed land.

And the said The Southern Pacific Railroad Company of California prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JOHN A. WRIGHT,
Per J. E. K. C.,
Attorney for Plaintiff in Error.

Endorsed: Filed July 10th, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

56 UNITED STATES OF AMERICA, *ss:*

To Daniel McCusker, Tillatha McCusker, his wife; Thomas Walker, Franklin McCusker, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as register of the State land office of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1885, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein The Southern Pacific Railroad Company of California is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable S. B. McKee, acting chief justice of the supreme court of the State of California, this 15th day of June, A. D. 1885, and of the Independence of the United States the one hundred and ninth.

J. McKEE, *Acting C. J.*

57 Due service of the within citation, by delivery of a copy thereof, is hereby admitted this 19th day of June, A. D. 1885.

A. S. KITTREDGE,
Att'y for Def'ts in Error, Thomas Walker and Bank of Washington.

(Endorsed:) 8333. In the Supreme Court of the United States. The Southern Pacific Railroad Co. of California, pl'ff in error, *vs.* Daniel McCusker *et al.*, def'ts in error. Citation. Filed June 26th, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court before you, between the Southern Pacific Railroad Company of California, plaintiff in error, and Daniel McCusker, Tillatha McCusker, his wife; Thomas Walker, Franklin McCusker, The Bank of Watsonville, Thomas Beck, John Thompson, and William Minis, as register of the State land office of the State of California, defendants in error, a manifest error hath happenened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you

have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, District of California,
By F. D. MONCTON,
Deputy Clerk.

The above writ of error is hereby allowed.

McKEE, *Acting C. J.*

59 [Endorsed:] 8333. United States Supreme Court. The Southern Pacific Railroad Co. of California, pl'ff in error, *vs.* Daniel McCusker *et al.*, def'ts in error. Copy. Writ of error. Lodged for defendant- in error 15th June, 1885. J. W. McCarthy, clerk, by Frank Myers, deputy.

60 *Clerk's Certificate.*

In the Supreme Court of the State of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY OF CAL. *v.* DANIEL MCCUSKER *et al.* } No. 8333.

I, J. W. McCarthy, clerk of the supreme court State of California, do hereby certify that the foregoing 59 pages, numbered from 1 to 59, both numbers inclusive, contains a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitutes the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this 10th day of July, A. D. 1885.

[Seal Supreme Court of California.]

J. W. MCCARTHY,
Clerk of the Supreme Court of California.

Endorsed on cover: California supreme court. No. 262. The Southern Pacific Railroad Company, plaintiff in error, *vs.* Daniel McCusker, Tillatha McCusker, his wife; Thomas Walker, *et al.* Filed August 1, 1885.